***United States Court of Appeals***

***for the Second Circuit***


# REPLY BRIEF

ORIGINAL
with proof of service

74-1751

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P/S

# United States Court of Appeals

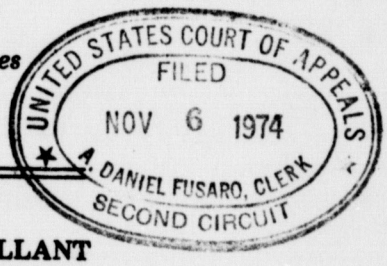
For the Second Circuit.

NARROWS PROMOTIONS, LTD. d/b/a ELITE DELI,
*Plaintiff-Appellant,*

-against-

HARTFORD INSURANCE COMPANY,
*Defendant-Appellee*

*On Appeal from the District Court of the United States for the Eastern District of New York*




## SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-APPELLANT

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## Statement

This supplementary reply brief is submitted by the plaintiff-appellant in support of two propositions, to wit: That Appellee's

contention on page eighteen (18) of its brief in the third paragraph is an erroneous mis-statement of the appellant's point and that the usual course of business of the defendant-appellee, as demonstrated by the testimony adduced at the trial, leads to the obvious conclusion that no reasonable standard of care has been exercised by the defendant-appellee worthy of permitting the introduction of its business records into evidence.

## POINT I

IN PAGE EIGHTEEN (18) OF APPELLEE'S BRIEF THERE IS A GROSS MIS-STATEMENT OF THE APPELLANT'S POSITION.

Page eighteen (18) paragraph three (3) of the Appellee's brief reads as follows:

> "Assuming, (sic) arguendo, that the policy was cancelled on October 12, 1971, or 305 days after inception, then, and in such event, the policy would not have been in existence on October 24, 1971, date of fire. And if, as claimed, there was also due a return premium of $200.84, plaintiff would be entitled to it on demand as provided by policy condition."

On the contrary, the plaintiff has never claimed, either on the trial court or upon appeal, that the insurance policy which is the basis of plaintiff's cause of action was ever cancelled!

It was appellant's position that the mathematical facts disclose, given an annual premium of $2,842.86 including the finance charge, corresponds to a daily cost of insurance to the insured of $7.79, that using the defendant's conceded receipt of $2,588.52, the insured had paid for 332 days of insurance or until June 22, 1971.

It is obvious that if defendant's first cancellation notice which was effective June 1, 1971 were to be used, the policy would have been in effect 311 days (due to an error in computation, appellant's brief stated 305 days). The earned premium would have been 311 days times the per diem rate of $7.79 or $2,422.69. Subtracting that amount from the $2,588.52 concededly received by defendant, the insured would have been entitled to a rebate of $165.83 (due to the original e-ror in computation, our brief stated a pro rata rebate of $200.84).

## POINT II

**DEFENDANT'S USUAL COURSE OF MAINTAINING BUSINESS RECORDS, AS DEMONSTRATED BY THE TESTIMONY ADDUCED AT THE TRIAL, REVEALS THAT THE ORDINARY STANDARD OF CARE USUAL TO BUSINESS RECORDS WAS NOT ADHERED TO BY THE DEFENDANT.**

Defendant's testimony and evidence as to usual office practice and procedure followed in the regular course of business, by itself, its agents and employees, discloses such irregularities, lack of uniformity and due care as not to qualify under the regular course of business rule.

(1)

The first "acknowledgement of cancellation by policyholder" is designed to effectuate collection of the alleged premium due and not cancellation, testimony of Rossi (89a):

"Q An acknowledgment of cancellation; is that a notice to him to pay?

A Right.

Q You want him to pay Chemical Bank?

A Right.

Q So, when you do that you are telling the assured that the Chemical has notified you that he should pay the Chemical an installment?

A Right."

Notwithstanding the purpose of the notice, the wrong form obviously was used (defendant's Exhibit B - Exhibit Book at Page 14) there being no provision on that form to notify the mortgagee, and Benway testified (226 a and 227a):

"Q You say you called the company and asked the reason for the recall notice. What did they tell you?

A A Mr. Jonathan Pon called us back and said he received a termination notice from the New York Finance Office which he felt was not sufficient notice because it had a mortgagee on a policy. The cancellation that was originally sent was only sent to the insured and not First National City Bank and he felt to establish a correct cancellation he had to re-do it and he did.

THE COURT He said he didn't send the first notice to First National City Bank?

THE WITNESS The first notice in May, from what I gather here -- because I didn't receive that notice -- went from 123 William Street to Mr. DeFrancel. That took care of that cancellation but left the first National City Bank on so he did it all over again to the Narrows Promotions and the First National City Bank.

Q That is what he told you?

A Yes.

THE COURT It looks like that is what happened too."

Benway testified he purchased the insurance business from the original producer of record, including the instant policy on December 1st, 1970 (202a and 203a):

"Q Did you know a man called Piazza?

A John L. Piazza.

Q What line of business was he in?

A He was an insurance agent.

Q And did you have any business relationship with him on or about December 1st, 1970?

A I purchased his business.

Q He was in somewhat of a similar type of business that you were in?

A Exactly.

Q When you purchased his business did you remove any records or papers or policies from his office to your office?

A Yes, his total insurance records were brought to my office.

Q Among those papers and records --

THE COURT You must speak up. You are dropping your voice. Speak up so Mr. Kaplan can hear you. I am having difficulty.

MR. KAPLAN I hear him.

Q Among such papers you received were any concerned with Narrows Promotions Limited doing business as Elite Deli?

A Yes.

Q Did you handle business for that firm?

A Yes."

Yet, 6 months later, defendant's records disclosed John L. Piazza as the purchaser of record and the only copy of the notice sent the insured was marked to Piazza instead of Benway who was in control of the account (see testimony of Rossi at Page 90a).

Of the quadruplicate form, the original was allegedly sent to the corporate insured, whose president, Robert DeFranco, denied receiving it; a copy was mailed to the wrong producer of record; two copies were placed in the defendant's file; thus leaving the agent in control of the line, Benway and the mortgagee, First National City Bank, without notice.

(2)

The second and third alleged communications, the Chemical Bank "Reminder" (Defendant's exhibit F - exhibit book at page 21), which the court below found was received by the defendant on May 12, 1971 and June 7, 1971 respectively (241a).

The colloquy between the court and plaintiff's attorney and the court and defendant's attorney (84a - 87a) leads to the inescapable conclusion that the originals of the two Chemical Bank "Reminder" notices were intended to be mailed to this insured. No proof of mailing by Chemical was offered and as stated in our reply brief, insured's address was so vague as to make delivery impossible.

(3)

The fourth alleged communication, the "Recall" notice of cancellation (defendant's Exhibit K - Exhibit Book at Page 35) dated July 13, 1971 discloses no zip code for the insured, addressed to "Narrows Promotions d/b/a/ Elite Deli" whereas the first alleged notice of cancellation was addressed to "Narrows Promotions, Inc." This form calls for an authorized signature of the defendant, but none appears. Perhaps the most glaring irregularity is that under Producer's Name & Address, only the name "Charles Benway" and a number appear - no address is, however, given. Benway testified he not only received his copy, but made another copy of it and mailed it to this insured. Defendant's testimony was that the two alleged cancellation notices were sent from two different locations, the first from defendant's Premium Finance Department located at 125 William Street, New York, New York. At that location a "stuffer" is not used in the mailing process and a mailing manifold is used as proof of mailing. Whereas the second notice of cancellation was sent from defendant's Underwriting Department at 175 Remsen Street, Brooklyn, New York. At that location a stuffer is used to place the notices in the same window envelopes used at the other location, and individual certificates of mailing are used as proof of mailing.

(4)

Benway's letter of July 27, 1971 is addressed to "Mr. Joseph DeFranco", notwithstanding the reference in the same letters (defendant's Exhibit N - Exhibit Book at Page 38) is "Narrows Promotions d/b/a as Elite Deli". The copy of this notice states cancellation is effective 35 days after receipt, however, the Benway letter states the company has terminated the insurance coverage effective "August 18th, 1971 at 12:01 a.m.". The letter also states "We have been in touch with the company and they cannot locate their file".

(5)

The "Final Balance" dated September 28, 1971 (defendant's Exhibit C - Exhibit Book at Page 17) is addressed to the insured, again without a zip code and ten months later the producer of record is still stated as John L. Piazza. The computations show that defendant billed insured for an entire year's premium from July 25, 1970 to July 24, 1971 or eleven days after the date of the second cancellation notice. This letter is signed by Ann Rossi. The "Final Notice" dated October 12, 1971 (defendant's Exhibit D Exhibit Book at Page 18) signed by A. Rossi states in the form that a copy of the letter was sent to insured's agent, but without naming the agent.

## CONCLUSION

We have previously stated that Hartford fell short of the required proof of cancellation of the policy and further that Hartford is equitably estopped from claiming that the policy was cancelled. We now add that Hartford's usual conduct of business leaves sufficient room to doubt the truthfulness of its records.

Accordingly, a decision and judgment of a lower court must be reversed as a matter of law and judgment must be entered in favor of the plaintiff-appellant for the relief demanded in the complaint.

Respectfully submitted,

JOHN L. PIAZZA,

Attorney for the Appellant

New York, New York

November 4, 1974

AFFIDAVIT OF SERVICE

STATE OF NEW YORK )
CITY OF NEW YORK ) ss.:
COUNTY OF NEW YORK)

MARIA B. WOLFF, being duly sworn, according to law, deposes and says:

1. Deponent is not a party to the within appeal, is over twenty-one (21) years of age, and resides in the City, County and State of New York.

2. On November 4th, 1974, deponent served two copies of the within Supplemental Reply Brief of Plaintiff-Appellant upon Messrs. Greenhill & Speyer, attorneys for the Appellee in this appeal at 56 Pine Street, New York, New York 10005, the address designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the City, County and State of New York.

Maria B. Wolff
MARIA B. WOLFF

Sworn to before me this
4th day of November, 1974.

HERMAN A. STUHL
Notary Public, State of New York
No. 31-9230450
Qualified in New York County
Commission Expires March 30, 1976